CRIMINAL APPEAL NO. 1486 OF 1984.

Date of decision: 1.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. K.P. Raval, A.P.P. for appellant-State.
Mr. D.D. Vyas, advocate for respondents.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

March 1, 1996.

Oral judgment (Per Jain, J.)

The respondents/original accused were charged and tried for offences punishable under Sections 148 and 307 read with Section 149 read with Section 34 of Indian Penal Code and under Section 135 of the Bombay Police Act, for constituting unlawful assembly with an object to commit wrong and thereby making attempt to take life of injured

Bhikhubhai Rambhai. The learned Additional Sessions Judge, Surendranagar, vide his judgment and order dated 24.9.1984 acquitted all the respondents and, therefore, aggrieved by the order of acquittal the State preferred this appeal.

In order to appreciate the evidence and rival contentions, it would be apposite to bring on record salient feature of the case.

The incident is alleged to have occurred on 18.7.1983 at about 9.30 A.M. near the main gate of Treasury Office, Lakhtar. The injured Bhikhubhai Rambhai who is a member of police force was assigned the duty Guard at treasury. At the relevant time the complainant was on duty as Guard. The injured was seen coming on cycle from police line and passing by the main gate. It is at this time that, as alleged, all the five respondents/original accused attacked the injured. Respondent Nos.1 and 2 were armed with hoe 'chhoria' (kodali) and alleged to have given blows on the head of injured whereas rest of the three respondents, namely, original accused Nos.3, 4 and 5 had given beating by sticks. On seeing this, the complainant, a police guard on duty, raised shouts and challenged the accused. He intervened and caught hold of accused No.1, Lalji Shankar Patel. On hearing commotion, some other persons also appeared at the scene of offence and one of them caught hold of respondent No.2, Prahlad Trikam Patel, whereas others had fled away. Having found that injured has received serious injuries, was immediately taken to Primary Health Centre at Lakhtar from where under medical advice was taken to Limbdi Hospital and from Limbdi Hospital, the injured was removed to Vadilal Sarabhai Hospital, Ahmedabad. It is the case of prosecution that when the injured was removed to Limbdi Hospital, was accompanied by 2/3 persons, including the complainant. After reaching Limbdi and arranging for treatment of the injured, the complainant lodged the complaint with Limbdi Police Station at 11.50 A.M. and the same was transmitted to Lakhtar Police Station at about 4.15 P.M., upon which Lakhtar Police Station took cognizance of the matter and the investigation was set in motion.

In this case, the prosecution has examined as many as 24 witnesses. But, in our view, for the purpose of deciding this appeal, reference to few would only be sufficient. The complainant has been examined as P.W.3, Ex.16, and the FIR has been produced at Ex.54. Another constable Shankerbhai Polabhai who caught hold of respondent No.2, is examined as P.W.5, at Ex.23. Gaidsinh Umedsinh is

examined as P.W.6, at Ex.24. Pannasing Rupsing is examined as P.W.7, Ex.25. Some other independent witnesses have also been examined, i.e., Lalji Dhanabhai at Ex.39 and Ramesh Khimchandbhai at Ex.27. At the outset, we may say that their evidence cannot be believed and accepted as they have turned hostile. The injured Bhikhubhai Rambhai has been examined as P.W.8, Ex.26 and the Investigating Officer has been examined as P.W.24, Ex. 47.

Ostensibly the evidence appears to be cogent and concrete but when examined very closely and carefully, we find that full of inconsistencies and and thus raise doubt about the trustworthiness of case of prosecution. Mr. Vyas, learned advocate for the respondents, has invited our attention to Ex.54, FIR, which was lodged at Limbdi Police Station and then was transmitted to Lakhtar Police Station and investigation was initiated. It is the case of the prosecution that the incident took place at Lakhtar at 9.30 A.M. in presence of witnesses who are also police officers. The evidence has also come on record that within couple of minutes respondent No.1 was caught hold and was sent to Lakhtar Police Station with two other constables. The Investigating Officer, in his testimony, has stated that immediately on receipt of telephonic message he deputed some police officers to go to the place of offence for maintaining law and order. He also visited and took appropriate steps for drawing panchnama, etc. He further states that he received FIR Ex.54 from Limbdi Police Station subsequent to the arrest of two accused and his visit at the place of offence. The very fact that the Investigating Officer took cognizance and started investigation shows that he must have had information on which the entire investigation was based. The FIR, Ex. 54, recorded at Limbdi Police Station, was received by him at a subsequent point of time. Thus, the circumstances apparently suggest that there are two informations. However, only one, Ex.54, has come on record and thus the prosecution shall be deemed to have suppressed another one. This fact by itself cast doubt about the prosecution case and its very genesis.

Apart from this fact, no satisfactory explanation has come on record as to why the FIR was lodged at Limbdi Police Station and not at Lakhtar? and why there is a delay? The incident had taken place at Lakhtar, two of the accused were caught hold and handed over to the police Station at Lakhtar. The Police Sub Inspector, Mr. Parmar, on receipt of telephonic message, had also gone to the site and started investigation. Then what was the

reason for not giving FIR at Lakhtar Police Station?

In this case, the injured and the witnesses, who are members of police force, are supposed to know value of FIR and procedure to be adopted in case where any cognizable offence takes place. The complainant, Kesharkhan Bhimji, is a constable. Being member of Police Force, he is very well aware that appropriate machinery is provided at Lakhtar with responsible officer. As a man of common prudence, he should have gone to Lakhtar Police Station and lodged FIR specially when apprehended accused could be sent. But for the reasons best known to the prosecution, the FIR is lodged at Limbdi Police Station which is at a distance of approximately 70 kms. from the place of offence. We do not find any convincing and satisfactory explanation:
1) for delay
2) for lodging FIR with police station at a distance of 70 kms. though same machinary is available at the place of incident.

As a cardinal rule, it is the duty of prosecution to explain delay and the circumstances under which the FIR was lodged at Limbdi. But we do not find an iota of evidence while going through the testimony of all the witnesses and thus this circumstance gives rise to doubt about trustworthiness and reliability of the prosecution case.

The injured has been examined at P.W.8, at Ex.26. In para 2 of his testimony he refers to recording of dying declaration by Mamlatdar at Limbdi Hospital. But such document has not come on record. We are conscious that since the person whose statement is recorded is alive and, therefore, such document will loose its significance as dying declaration and cannot be relied upon as a substantive piece of evidence under Section 32 of Indian Evidence Act. But nonetheless, the evidence can be used for the purpose of contradiction or formation of ones own defence. Had the prosecution given this document to the respondents, the respondents would have been able to form their defence depending upon the contents thereof and thus has resulted into injustice to the accused. The injured witness has categorically admitted that he did disclose the names of assailants in his statement recorded by the Mamlatdar. In this case, when the presence of other respondents, that is, respondent Nos.3, 4 and 5 is doubted, in our view, the document, that is, statement recorded by Mamlatdar, if brought on record, would have provided answer and/or would have enabled the defence to form its appropriate defence. This is nothing

else but a case of suppression of document and adverse inference has to be drawn against prosecution. One does not know as to whose names as assailants were disclosed by the injured in his statement before the Mamlatdar. By drawing adverse inference we may safely say that the names may be different than that of the assailants/respondents and, therefore, deliberately the document must have been suppressed and thus the prosecution does not seem to be fair and honest.

Mr. Vyas has also vehemently argued that the oral testimony of the complainant and the FIR at Ex.54 are full of inconsistencies and, therefore, the complainant cannot be relied upon as truthful and credible witness. In his oral testimony at Ex.16, he states that on seeing the respondents assaulting the injured, he immediately rushed towards the place to rescue and in the process caught hold of respondent No.1 and respondent No.2 was caught hold by Shankerbhai Polabhai and others had fled away and the accused Nos.1 and 2 were handed over to Umiyashanker and Bhalabhai for being taken to Police Station at Lakhtar whereas FIR at Ex.54 is quite contrary to it. In the FIR given by him he states that he caught hold of respondent No.1 only and rest of the four respondents were caught by other persons assembled there on hearing commotion. Thus, there is a material discrepancy and creates doubt about involvement of rest of the accused. As regards weapons, we find material discrepancy between the oral testimony of Investigating Officer and FIR. The complainant in his testimony states that the accused Nos.1 and 2 were caught with hoe (chhoria) and with said weapons they were send to Police Station at Lakhtar and were handed over to Investigating Officer whereas the Investigating Officer in his cross-examination, para 20, admits that at the time when respondent Nos.1 and 2 were produced before him were not having hoes with them. The weapons - hoes alleged to have been used by respondent Nos.1 and 2 were recovered by investigation and were sent to Forensic Science Laboratory for examination. As evident from Ex.50, weapon (hoe) was sent to the laboratory as Ex.3 but on examination no blood much less human blood could be detected. Use of said weapon is alleged in commission of offence and if in fact such weapon was used in commission of offence resulting into bone deep injury, naturally the weapon would have received blood stains. According to the prosecution, the assailants/respondent Nos.1 and 2 were caught immediately within a couple of minutes and were handed over to the investigating agency, who, in turn, recovered the weapons without affording any opportunity to the respondents for destroying the

evidence like existence of blood on the weapons. If we accept this evidence of prosecution, then presence of human blood must be found during examination, but the report, Ex.50, is eloquent about absence of human blood on Ex.3, namely, weapons recovered and alleged to have been used for the commission of offence. This circumstance by itself casts doubt about use of weapon as alleged by prosecution and destroys the case.

Mr. Vyas, learned advocate for the respondents, has also drawn our attention to the infirmity between medical evidence and the use of alleged weapons, Medical certificate issued by Medical Officer, Lakhtar Hospital, is produced at Ex.10 and that of Limbdi Hospital is at Ex.12. According to this evidence, only two C.L.Ws. were found on the body of injured Bhikhubhai Rambhai. Of course, first injury is found on scalp on right side of parietal bone and is bone deep wound and, therefore, is serious in nature and also on vital part of the body. According to the prosecution, the hoes are used in commission of offence, meaning thereby, that the injuries must have been caused by hoes but we are of the view that such injuries are not possible by this type of weapon as is having sharp edge and use of weapon having sharp edge always results in incised wounds. Mr. Raval, learned A.P.P., has argued that while causing injury, blunt portion of the hoes must have been used as a result of which C.L.W. injuries are caused. It is true as opined by P.W.2, Dr. H.T. Zala, that use of blunt portion of hoes can result into this type of injuries but this evidence is not sufficient to accept contention of the learned A.P.P. According to well settled principles of law, this has to be explained by the prosecution through the evidence of injured or other eye witnesses but the evidence on record sans any clarification much less satisfactory one. This circumstance also creates doubt about use of weapon as alleged by prosecution. Similarly, according to the prosecution, respondent Nos.3, 4 and 5, had also assaulted the injured with sticks. If this is accepted then in all five weapons were used during assault, that is, two hoes and three sticks, whereas only two injuries are on the body of the injured and, therefore, from this angle also the injuries found on the body of the injured do not tally with use of weapons as alleged or in other words, the version of prosecution about use of weapons is not corroborated by medical evidence. This leads us to draw inference that the genesis of case is suppressed and if that is so, the case as advanced by prosecution falls much short of being reliable, trustworthy and credible so as to convict the accused.

The cumulative effect of our discussion leads us to hold that the oral testimony of injured and eye witnesses is not corroborated by medical evidence. Testimony of complainant is not trustworthy and reliable. Delay in lodging FIR is not satisfactorily explained and some important documents have been withheld by prosecution with a view to suppress the genesis of case and, therefore, the case of prosecution does not inspire confidence and cannot be said to be reliable and trustworthy. We are of the opinion that the learned Additional Sessions Judge is right in not believing and discarding the evidence of prosecution. We do not find any error in appreciation of evidence. Consequently, we feel that the appeal is devoid of merits and must fail.

Accordingly the appeal is dismissed. Judgment and order of the trial Court is confirmed.